STATE OF MICHIGAN

IN THE SUPREME COURT

NORTH AMERICAN BROKERS, LLC,
a Michigan limited liability company, and,
MARK RATLIFF, an individual,

Plaintiffs/Appellees,

Supreme Court Docket No. _____
Court of Appeals Docket No. 330126
Lower Court Case No.: 15-28669-CH

vs.

HOWELL PUBLIC SCHOOLS,
a Michigan general powers school district, and,
ST. JOHN PROVIDENCE, a Michigan corporation,

Defendant/Appellant.

JAMAL JOHN HAMOOD (P40442)
Attorney at Law
Attorney for Plaintiffs/Appellees
336 South Main Street, FL 1
Rochester, Michigan 48307
(248) 705-6500

THOMAS J. MCGRAW (P48817)
STACY J. BELISLE (P59246)
MCGRAW MORRIS P.C.
Attorneys for Defendant/Appellant Howell Public Schools
2075 West Big Beaver Road, Suite 750
Troy, Michigan 48084
(248) 502-4000

ALI H. KOUSSAN (P75044)
Koussan Hamood, PLC
Co-Counsel for Plaintiffs/Appellees
28819 Franklin Road, Suite 100
Southfield, Michigan 48034
(313) 355-0003

RICHARD E. SHAW (P33521)
Attorney for Plaintiffs-Appellees
1880 Shepherds Drive
Troy, MI 48084
(248) 703-6424

**DEFENDANT/APPELLANT HOWELL PUBLIC SCHOOLS' APPLICATION FOR LEAVE TO APPEAL PURSUANT TO MCR 7.305(B)1, 2, 3 AND 5**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF APPELLATE JURISDICTION

As set forth below, the Michigan Supreme Court has jurisdiction concerning this Application for Leave to Appeal pursuant to MCR 7.305(B)(1), (2), (3) and (5).

## STATEMENT OF JUDGMENT APPEALED, GROUNDS AND RELIEF SOUGHT

Defendant/Appellant Howell Public Schools ("Howell") submits this Application for Leave to Appeal the February 9, 2017 unpublished opinion and order of the Michigan Court of Appeals, which incorrectly determined that Howell could not rely on the Michigan statute of frauds to defeat Plaintiffs' claims that they are entitled to a commission on the sale of real estate despite having no written instrument in support of their claims. (See *North American Brokers, LLC, et al, v Howell Public Schools, et al*, unpublished opinion per curiam of the Michigan Court of Appeals, Docket No. 330126 (dated February 9, 2017), attached as Exhibit A). This Court should grant leave to correct the Court of Appeals' incorrect decision. This Court should do so because the Court of Appeals' decision:

(1) Perpetuates the judicial attack on the established rules of statutory construction in Michigan, thus calling into question the validity of the statute of frauds, a legislative enactment;

(2) Significantly impacts the public interest by eviscerating the application of the statute of frauds, a legislative enactment, particularly with respect to the statute's application to Howell, an agency of the state of Michigan;

(3) Involves a legal principle of major significance to the state's jurisprudence, as the decision continues to attack the efficacy and validity of the statute of frauds, a legislative enactment; and

(4) Is clearly erroneous and will cause material injustice to Howell and any other party seeking to rely on the statute of frauds, as the decision conflicts with other decisions of this Court and the Court of Appeals.

## PROCEDURAL HISTORY

This lawsuit arose out of Howell's placement of property for sale by owner. The property is located at 1201 S. Latson Road in Genoa Township, Michigan ("Property"). In connection with placing the Property on the market, Howell placed a for sale sign on the Property that included the words "broker protected." Plaintiff North American Brokers ("NAB") is a real estate brokerage firm. Plaintiff Mark Ratliff is, upon information and belief, a property developer, but not a licensed real estate broker.

In connection with Howell's sale of the Property, Plaintiffs learned about Howell's decision to offer the Property for sale and attempted to form a relationship with Defendant St. John Providence ("SJP") to find land for an SJP facility.[1] (Complaint at ¶¶9-22, attached as Exhibit B). SJP was not a client of Plaintiffs, but Plaintiffs knew of SJP's desire to construct a new facility and attempted to find various properties for sale that would suit SJP's needs. According to Plaintiffs' allegations, Plaintiffs attempted to find a good location for the SJP facility, in order to convince SJP to hire them as brokers, as no actual relationship ever existed between Plaintiffs and SJP. (Ex. B, Complaint at ¶17). Although Plaintiffs informed SJP of the Property, SJP unquestionably rejected Plaintiffs' attempts to form a relationship with them. After several months of attempting to form a relationship with SJP, Plaintiffs and SJP went their separate ways.

Plaintiffs also sought to be hired by Howell, but, like their attempt to form a relationship with SJP, Howell expressly rejected their request, and continued selling the Property by owner. (Ex. B, Complaint at ¶33). Importantly, unlike SJP, which knew of Howell's identity, Plaintiffs

[1]Defendant SJP settled with Plaintiffs early in this litigation and is no longer a party to this action. SJP was dismissed from the lawsuit pursuant to a stipulated dismissal order entered October 23, 2015, to which Howell was not a signatory.

never identified SJP to Howell. Instead, Plaintiffs kept SJP's identity a secret in order to prevent SJP and Howell from forming a relationship. Plaintiffs do not allege that Howell ever learned of SJP's identity.

In July 2014, despite Plaintiffs' attempts to form a relationship with SJP, SJP independently hired another real estate broker, Thomas A. Duke Company, and purchased the Property from Howell for $5,075,000.00. (Ex. B, Complaint at ¶37). Thomas A. Duke Company, as SJP's broker, received a commission for its services. (Ex. B, Complaint, Ex. C, Art. 10). Despite not being hired by either SJP or Howell, and despite the fact that Howell did not and could not have known of SJP's identity, Plaintiffs filed the instant lawsuit in August 2015 in the Livingston County Circuit Court claiming an entitlement to the commission that Thomas A. Duke Company received from the sale of the Property. Plaintiffs' complaint asserted the following claims: (1) promissory estoppel; (2) quantum meruit; (3) negligent misrepresentation; (4) procuring cause; and (5) breach of contract.

In lieu of filing an answer to Plaintiffs' complaint, Howell filed a motion to dismiss pursuant to MCR 2.116(C)(7) and (8). Howell asserted that, based on Michigan's statute of frauds, MCL 566.132, Plaintiffs failed to state a claim against Howell because Plaintiffs admitted that there was no written agreement between Plaintiffs and Howell for the payment of a commission on the sale of real property. Howell further asserted that it was entitled to governmental immunity for any tort claims Plaintiffs asserted against it.

On October 15, 2015, Judge Michael Hatty of the Livingston County Circuit Court held a hearing on Howell's motion. After hearing oral argument from the parties, Judge Hatty granted Howell's motion, finding that the statute of frauds barred Plaintiffs' claims because there was no written agreement between Howell and Plaintiffs regarding the payment of a commission for the

sale of the Property. Judge Hatty further determined that governmental immunity barred Plaintiffs' tort claims. Accordingly, the trial court entered an order dismissing Plaintiffs' lawsuit in its entirety.

On November 12, 2015, Plaintiffs filed a claim of appeal to the Michigan Court of Appeals. In appealing the trial court's dismissal of their lawsuit, Plaintiffs asserted that the trial court incorrectly granted Howell's motion because a writing sufficient to entitle Plaintiffs to a commission from Howell existed. To that end, Plaintiffs asserted that Howell's for sale sign itself induced Plaintiffs to rely to their detriment on Howell's alleged promise to pay them a commission for the sale of the Property to SJP. Therefore, Plaintiffs' entire lawsuit is based on the words "broker protected" on Howell's for sale sign. Plaintiffs assert that these words induced Plaintiffs to attempt to form a relationship with SJP and that when SJP decided to purchase the Property without Plaintiffs' involvement, it was unfair to deny Plaintiffs the commission on the sale.

On February 9, 2017, the Court of Appeals issued its opinion and order in this matter and reversed the trial court's dismissal of Plaintiffs' lawsuit. (See Ex. A). In reversing the trial court, the Court of Appeals stated that it was bound by the precedent of this Court to hold that application of the statute of frauds was suspended based on Plaintiffs' promissory estoppel claim. In reversing the trial court, the Court of Appeals expressed significant reservations about doing so, stating:

> While we acknowledge that our opinion reaches the *correct* result under our present legal framework, it is the *wrong* result. We urge the Michigan Supreme Court to grant leave to address the issue presented in this case. The judicially created doctrine of promissory estoppel, as applied to the facts of this case, subsumes the statute of frauds and makes the statue of frauds irrelevant.

*Id*. at 4, n2. In reaching this conclusion, the Court of Appeals believed that it was constrained to follow *Opdyke Inv Co v Norris Grain Co*, 413 Mich 354; 320 NW2d 836 (1982), which

recognized, without citation to any legal authority, that estoppel and promissory estoppel have developed to avoid the arbitrary and unjust results required by an overly mechanistic application of the statute of frauds. *Id*. at 365. In doing so, the Court of Appeals stated that "[r]egardless of the wisdom of using a judicially created exception to a statute, we must apply it." *North American Brokers*, supra at 3.

The Court of Appeals' decision is wrong and incorrectly reversed the trial court's dismissal of Plaintiffs' lawsuit for the following reasons:

(1) the Court of Appeals' decision and prior decisions of this Court which apply estoppel to suspend application of the statute of frauds do not comport with established Michigan law which requires that clear and unambiguous statutory language must be applied as written, thus calling into question the validity of the statute of frauds, a legislative enactment, which is a legal principle of major significance to the state's jurisprudence and significantly impacts the public interest by eviscerating the statute of frauds;

(2) prior decisions of this Court which recognize an estoppel exception to the application of the statute of frauds are critically distinguishable from the facts in this matter, a point which Howell stressed to the Court of Appeals but which the court ignored, which is a clearly erroneous application of Michigan law and which causes material injustice to Howell and anyone relying on the statute of frauds; and

(3) as *Opdyke* does not compel a reversal of the trial court's decision, the Court of Appeals' decision was clearly erroneous and conflicts with other decisions of this Court and the Court of Appeals.

## STATEMENT OF QUESTIONS PRESENTED

I. Did The Court Of Appeals Incorrectly Determine That The Statute Of Frauds Was Inapplicable To This Matter Because Plaintiffs Pled A Promissory Estoppel Claim, Such That The Court of Appeals' Decision Is Contrary To Established Michigan Law Requiring That Clear And Unambiguous Statutory Language Be Enforced As Written?

Plaintiffs: No

Defendant Howell: Yes

Trial Court: Yes

Court of Appeals: No

II. Even If It Were Appropriate To Suspend Application Of The Statue Of Frauds Based On Plaintiffs' Promissory Estoppel Claim, Did The Court Of Appeals Fail To Recognize That Case Law Supporting Its Decision Is Factually Dissimilar To The Instant Case?

Plaintiffs: No

Defendant Howell: Yes

Trial Court: Yes

Court of Appeals: No

## DETAILED STATEMENT OF FACTS

According to Plaintiffs, they became aware that Howell was selling the Property when they saw Howell's for sale by owner sign ("Sign") on the Property. (Ex. B, Complaint at ¶14). In connection with the sale of the Property, Howell never signed an agreement with Plaintiffs or any other real-estate broker to assist in the sale of the Property and the Property was at all times for sale by owner.

As to SJP, Plaintiffs allege that they had a number of meetings with SJP executives in an attempt to establish a relationship with them, but SJP refused to form a relationship with Plaintiffs. (Ex. B, Complaint at ¶13). Despite this, Plaintiffs informed SJP of the Howell Property and went so far as to schedule a site inspection with SJP at the Property on October 28, 2013, but SJP did not appear.[2] (Ex. B, Complaint at ¶¶25-26). Plaintiffs nonetheless continued their quest to associate with SJP by sending SJP a letter of intent on November 1, 2013, which they requested SJP execute and return in order to establish a relationship. Plaintiffs did not receive a signed response to the letter or any response at all from SJP. (Ex. B, Complaint at ¶27).

At the same time, Plaintiffs informed Howell that they may have found a buyer for the Property but never disclosed to Howell that SJP was the entity in question. We now know that Plaintiffs' representation to Howell was false, as SJP never wanted to associate with Plaintiffs. Nevertheless, in furtherance of their ruse, on November 2, 2013, Plaintiffs claim that they sent Rick Terres, Superintendent of Howell, a "Confidentiality, Commission & Broker Protection Agreement" ("NAB Proposal") by e-mail in order to attempt to establish a relationship with Howell and bring SJP forward as a buyer. (Ex. B, Complaint at ¶28). Howell never signed the

[2]Howell was never advised of or consented to this alleged inspection of the Property.

NAB Proposal and notified Plaintiffs on December 10, 2013 that Howell's legal counsel opposed the Proposal in its entirety. (Ex. B, Complaint at ¶33).

It is obvious that, having failed to retain SJP as a client, Plaintiffs were attempting to trick Howell into executing the NAB Proposal, by providing false information that they had a client who was a willing buyer. Based on Plaintiffs' own allegations, they did not have a client interested in the Property, as SJP refused to become Plaintiffs' client. Plaintiffs were trying to force their way into a transaction by claiming that they represented a party whom they did not actually represent. Plaintiffs further represented to Howell, and likewise assert in their complaint, that in SJP, they had a buyer ready, willing and able to purchase the Property. Based on Plaintiffs' own allegations, this was false.

Despite the fact that (1) Plaintiffs never disclosed SJP's identity to Howell, and (2) that Plaintiffs never formed a relationship with any party in this lawsuit, Plaintiffs assert that they are entitled to a commission for SJP's purchase of the Property. Plaintiffs base this assertion and, indeed, this entire lawsuit on the fact that Howell's Sign on the Property included the words "broker protected," the meaning of which has no legal basis in Michigan and for which Plaintiffs have provided no legal support whatsoever. Plaintiffs claim that these words induced Plaintiffs to believe that they would be entitled to a commission on the sale of the Property if they provided Howell with a buyer for the Property. Based on Plaintiffs' own allegations in the complaint, Plaintiffs did not provide a buyer for the Property because SJP refused to contract with them. Therefore, Plaintiffs had nothing to do with the sale of the Property. Nowhere in the complaint do Plaintiffs allege that they disclosed the identity of their alleged client/buyer to Howell. Nowhere in the complaint do Plaintiffs allege facts regarding how and when SJP or its broker, Thomas A. Duke Company, actually contacted Howell. Nowhere in the complaint do

Plaintiffs allege facts that indicate that Howell used any information whatsoever provided by Plaintiffs with respect to the sale of the Property to SJP, as Plaintiffs never even disclosed the identity of their alleged client to Howell. Despite Howell's early motion to dismiss which pointed out these deficiencies, Plaintiffs have never sought to alter their allegations by seeking leave to amend their complaint to demonstrate just how Plaintiffs can possibly be entitled to a commission on a sale in which they had no involvement and which is based nothing more than Plaintiffs' own unsupported assertions about the meaning of the words "broker protected." These words do not even approach the type of promise, agreement or inducement referenced in any decision of this Court or the Court of Appeals which has held that it is appropriate to suspend the statute of frauds based on an estoppel claim. Therefore, there is no factual development that could substantiate Plaintiffs' claims against Howell.

What is clearly established from the facts alleged by Plaintiffs is: (1) Plaintiffs wanted very badly to be the real estate broker for either SJP or Howell on a large transaction; (2) Plaintiffs were not hired by either SJP or Howell; (3) Plaintiffs had no written agreement with either SJP or Howell; (4) Howell sold the Property to SJP without knowing that Plaintiffs ever tried to introduce SJP to purchase the Property; and (5) the only broker involved in the sale, Thomas A. Duke Company, was hired by SJP and received a commission for its services.

## LAW AND ARGUMENT

### Standard of Review

In deciding a dispositive motion based upon MCR 2.116(C)(7), all well-pleaded allegations are accepted as true unless specifically contradicted by affidavits or other documentation and construed most favorably to the non-moving party. *Barrow v Pritchard*, 235 Mich App 478; 597 NW2d 853 (1995). A court should grant a dispositive motion on the basis of

governmental immunity where no factual development could provide a basis for recovery. *Harrison v Director of Dept of Corr*, 194 Mich App 446; 487 NW2d 799 (1992). "To survive a motion for summary disposition, brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity." *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997).

A movant is entitled to summary disposition under MCR 2.116(C)(8) if "the opposing party has failed to state a claim on which relief can be granted." MCR 2.116(C)(8). In determining whether a movant has met this standard, the court "accepts as true all well-pleaded facts." *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005) (citing *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993)). Summary disposition should be granted where the claim is legally unenforceable and no factual development would justify recovery. *Simko v Balke*, 448 Mich. 648, 654; 532 NW2d 842 (1985).

## Legal Argument

### I. The Court Of Appeals Incorrectly Determined That The Statute Of Frauds Was Inapplicable To This Matter Because Plaintiffs Pled A Promissory Estoppel Claim, As The Court of Appeals' Decision Is Contrary To Established Michigan Law Requiring That Clear And Unambiguous Statutory Language Be Enforced As Written.

#### A. Relevant Law.

The issue in the instant matter is one of statutory interpretation. Therefore, the Court must apply its established principles of statutory construction. "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature." *Omelenchuk v City of Warren*, 466 Mich 524; 647 NW2d 493 (2002) (citing *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996)); *AFSCME v. City of Detroit*, 468 Mich 388, 399-400; 662 NW2d 695 (2003). To do so, the Court must begin by reviewing the language of the statute

at issue. If the statute's language is clear and unambiguous, the Court assumes that the Legislature intended its plain meaning, and the Court must enforce the statute as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). "In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992); *Omelenchuk* at 528 (quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001)). Additionally, courts "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) (emphasis added). As this Court stated in *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002), "[t]he Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written."

This Court has consistently applied these rules of statutory construction to Michigan statutes that parties have attempted to enlarge beyond the actual language contained within the statute, including the Whistleblowers' Protection Act ("WPA") and the Governmental Tort Liability Act ("GTLA"), the content of which parties are continually attempting to expand.

In *Wurtz v Beecher Metro Dist*, 495 Mich 242, 244, 848 NW2d 121 (2014), this Court held that the WPA did not apply to decisions regarding contract renewal of employees, such that the WPA provided no protection to a contract employee seeking a new term of employment. The Court based this decision on the actual language of the WPA, which contained a definition of the term "employee." Based on that definition, the Court determined that it was not appropriate to apply the WPA to a prospective employee, including those seeking contract

renewal, where the Legislature did not, pursuant to the language it used in drafting the WPA, intend to cover such individuals.

Similarly, in *Rowland v Washtenaw Cnty Rd Comm'n*, 477 Mich 197, 216-19; 731 NW2d 41, 53-55 (2007), this Court held that the GTLA, MCL 691.1404, is straightforward, clear, unambiguous, and not constitutionally suspect and that, accordingly, it must be enforced as written. The Court based its decision on its prior decision in *Robinson v Detroit*, 462 Mich 439, 463-468; 613 NW2d 307 (2000), in which the Court held that any statutory reliance analysis has to be considered in light of the plain language of the statute. The Court stated:

> Further, it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . ., that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error.

*Rowland*, *supra* at 216-19 (citing *Robinson*, *supra* at 467-468) (emphasis added). The Court relied on *Robinson* to support its decision to overrule prior decisions which misread and misconstrued the GTLA and perpetuated a prior incorrect construction of the statute. *Id.*

Again, in *Nawrocki v Macomb Cnty Rd Comm'n*, 463 Mich 143, 180-81; 615 NW2d 702 (2000), this Court overruled *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), because *Pick* failed to narrowly construe the highway exception to the GTLA and contradicted the

language of the GTLA, imposing upon state and county road commissions a duty under the highway exception to install, maintain, repair, or improve traffic control devices, including traffic signs, which was not required by the language of the statute. In reaching this decision, the Court cited to *People v Graves*, 458 Mich 476, 480-481; 581 NW2d 229 (1998), which sets forth the proper circumstances under which prior case law should be overruled:

> It is true of course that we do not lightly overrule a case. This Court has stated on many occasions that "under the doctrine of stare decisis, principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." Further, . .."before this court overrules a decision deliberately made, it should be convinced not merely that the case was wrongly decided, but also that less injury will result from overruling than from following it." When it becomes apparent that the reasoning of an opinion is erroneous, and that less mischief will result from overruling the case rather than following it, it becomes the duty of the court to correct it. Although we respect the principle of stare decisis, we also recognize the common wisdom that the rule of stare decisis is not an inexorable command. [Citations omitted.]

*Nawrocki*, *supra* at 180 (citing *Graves*, *supra*) (emphasis added).

The above-referenced rules of statutory construction have caused a long standing tension in the Court of Appeals regarding the application of the statute of frauds. The Court of Appeals has strenuously opposed utilizing estoppel claims as an exception to the application of the statute of frauds and has made overtures for this Court to provide direction on the matter or overrule prior inconsistent decisions. In various opinions, including the one at issue here, the Court of Appeals has encouraged this Court to clarify whether it is appropriate to continue applying the estoppel exception to the statute of frauds.

In *Kelly-Stehney & Assocs, Inc v MacDonald's Indus Prods, Inc*, 254 Mich App 608; 658 NW2d 494 (2003), *vacated on other grounds and remanded*, *Kelly-Stehney & Assocs, Inc v MacDonald's Indus Prods Inc*, 469 Mich 1046 677 NW2d 838 (2004), the Court of Appeals "question[ed] the continued viability of utilizing a judicially created doctrine like estoppel to

circumvent the plain language of the statute of frauds" and criticized Michigan courts for having "by judicial fiat created gaping holes in the statute of frauds that are inconsistent with the express language of the statute and the policy supporting it." *Kelly-Stehney*, 254 Mich App at 614 & n4.

In keeping with Michigan's long standing rules of statutory construction, the Court of Appeals in *Kelly-Stehney* observed that:

> Allowing judge-made doctrines such as estoppel to override and preclude the application of legislatively created laws such as the statement of frauds 'is contrary to well-founded principles of statutory construction and is inconsistent with traditional notions of the separation of powers between the judicial and legislative branches of government.' . . . Although we question the propriety of applying the equitable estoppel doctrine and other common-law exceptions to the statute of frauds, we will continue to do so until our Supreme Court states otherwise.

*Id*. at 615-616.

**B. Analysis.**

There is no language in Michigan's statute of frauds which provides a basis for any court to suspend its application when the party seeking to avoid the statute of frauds pleads an estoppel claim. Rather, the language in the statute of frauds is clear and unambiguous. Therefore, the statute of frauds must be enforced as written. Neither Plaintiffs nor the Court of Appeals provided a basis upon which to disregard established and prevailing Michigan law, which not only provides but requires that unambiguous statutory language must be enforced as written. Indeed, any court that holds otherwise, as the Court of Appeals felt compelled to do in this case, renders the statute of frauds "surplusage" and "nugatory," an outcome which is contrary to Michigan law.

Further, as this Court recognized in *Nawrocki* and *Graves*, it is appropriate for this Court to overrule prior decisions which held that an estoppel claim can override application of the statute of frauds. As set forth in *Rowland* and *Robinson* the people of the state of Michigan,

including Howell, look to Michigan statutory provisions as a guide for their conduct and for information on the state of the law. Nowhere in the statute of frauds does the Legislature state that the statutory requirement of a written contract will apply only if a plaintiff does not assert an estoppel claim, in which case it will be suspended. In relevant part, MCL 566.132 states:

> Agreements, contracts, or promises required to be in writing and signed; enforcement; "financial institution" defined.
>
> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or a note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise: …
>
> (e) An agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate.

MCL 566.132 (1)(e) (emphasis added). It is undisputed in the instant matter that neither Plaintiffs and Howell nor Plaintiffs and SJP entered into a written agreement of any kind, pursuant to which Howell or SJP agreed to pay Plaintiffs a commission when the Property sold. Therefore, Plaintiffs' claims should fail, as, pursuant to the statute of frauds' clear and unambiguous language, any agreement for the payment of a commission must be in writing, signed by an authorized individual. Applying this Court's prior decisions, the Court of Appeals believed that it was compelled to suspend this clear and unambiguous statutory requirement because Plaintiffs pled an unsupported estoppel claim.

Howell disputes that Plaintiffs pled a sufficient estoppel claim. Nevertheless, even if they had done so, it was inappropriate for the Court of Appeals to suspend the statute of frauds on that or any basis, pursuant to this Court's repeated direction that clear and unambiguous statutory provisions must be enforced as written. As the statute of frauds contains to exception to its application for any reason, the law of this state mandates that any decision of this or any other Court must be overruled to comply with the Legislature's intent in drafting the statute of

frauds.

Based on the Court of Appeals' absolute disagreement with the continuing application of the estoppel exception to application of the statute of frauds and the utter confusion as to whether a party can ever rely on the statute of frauds, overruling these prior decisions will not cause harm. Rather, overruling these prior decisions will clarify and strengthen the statute of frauds, providing much needed guidance and assurances to parties seeking to enforce it. Therefore, as recognized in *Graves, supra*, less injury will result from overruling prior decisions which suspend application of the statute of frauds when an estoppel claim is pled than from following it. *Graves, supra*. Further, as this Court recognized in *Graves*, "[w]hen it becomes apparent that the reasoning of an opinion is erroneous, and that less mischief will result from overruling the case rather than following it, it becomes the duty of the court to correct it." This is such a case and this Court has a duty to overrule prior decisions allowing suspension of the statute of frauds where an estoppel claim is pled. Not only will doing so provide clarity as to the correct application of the statute's clear and unambiguous language, it will also be consistent with prior decisions of this Court regarding application of the statute of frauds in a real estate commission context.

In *Ekelman v Freeman*, 350 Mich 665; 87 NW2d 157 (1957), the plaintiff, a real estate broker, claimed that she was the sole and procuring cause of a sale of real estate for $125,000.00. The plaintiff further claimed that she had a verbal contract to be paid a commission for her services. In upholding the dismissal of the plaintiff's claim for a commission, this Court stated:

> The provision of the statute here involved was incorporated therein by PA 1913, No 238. The legislative purpose was to protect the owners of real estate against unfounded claims based on alleged oral agreements for the payment of commissions for services in procuring sales. 12 CJS, p 142; *Thompson v. Carey's Real Estate*, 335 Mich 474; *Summers v. Hoffman*, 341 Mich 686, 695 (48 ALR2d 1033). It was doubtless deemed expedient, because of prior litigation involving

> such claims, to require a writing evidencing the obligation to pay such a repeatedly denied the right to recover on the quantum meruit theory for services rendered in commission as the basis of an action to recover. In accordance with the legislative purpose this Court has procuring a purchaser for real estate, the express agreement, if any, being oral and, hence, void under the statute.

*Id*. at 667-68.

In *Smith v Starke*, 196 Mich 311, 315; 162 NW 998(1917), in reversing a judgment for the plaintiff, this Court stated:

> But it is urged by the plaintiff that, even if the statute does render the contract void, he may recover upon the quantum meruit, upon the theory that performance takes the case out of the statute. This question is foreclosed by the recent case of *Paul v. Graham*, 193 Mich 447, where we had this statute under consideration and held that no recovery could be had upon the quantum meruit for services performed under an agreement that was within the provisions of this statute and therefore void.
>
> It follows that, plaintiff's contract with defendant being void, and no recovery permissible under it or upon the quantum meruit, the judgment must be reversed, and no new trial awarded.

*Id*. at 315. In *Mead v Rehm*, 256 Mich 488, 490; 239 NW 858 (1932), this Court held that the defendant was not liable for any commission on the sale of real estate, as there was no written agreement:

> If John Rehm may be held liable under the claimed verbal authority, then the evil the statute was intended to prevent will be present, and one who cannot be held liable on a verbal promise to pay a commission would be worse off than before the statute, for his liability would depend upon the promise of one asserting verbal authorization. A verbal agreement to pay the commission is rendered absolutely void by the statute, and there can be no recovery on quantum meruit, even though the service was rendered and accepted.

*Id*.

None of the above-referenced decisions provides a basis for suspending application of the statute of frauds when an estoppel claim is pled or for any reason. Based on established Michigan law regarding the rules of statutory construction and the language of the statute of frauds itself, this Court has a duty to overrule prior decisions allowing for an exception to the

application of the statute of frauds. Therefore, Howell requests that this Court grant leave for Howell to appeal the Court of Appeals' decision to the contrary.

## II. Even If It Were Appropriate To Suspend Application Of The Statue Of Frauds Based On Plaintiffs' Promissory Estoppel Claim, The Court Of Appeals Failed To Recognize That Case Law Supporting Its Decision Is Factually Dissimilar To The Instant Case.

The Court of Appeals' decision reversing the trial court's dismissal of this action is based on prior decisions of this Court, which the Court of Appeals believed compelled its decision. In applying those cases, however, the Court of Appeals blindly applied what it considered to be binding case law without consideration of the specific facts of the instant case or those of the cited cases. If this decision is allowed to stand, the Court of Appeals' incorrect application of the law will cause other panels of that Court to continue the misapplication of Michigan law, which is an incorrect application of the statute of frauds. The Court of Appeals' decision included the following determination, which demonstrates its failure to conduct any analysis of when the disputed estoppel exception to the statute of frauds applies:

> In this case, the Brokers pleaded a claim of promissory estoppel. The trial court granted summary disposition on the basis that the statute of frauds barred the Brokers' contract claims and governmental immunity barred its negligence claims. But because promissory estoppel remains an exception to the statue of frauds, the trial court erred by granting summary disposition on the Brokers' promissory estoppel claim.

(Ex. 1 at 4). The Court of Appeals' decision incorrectly assumes that any time a plaintiff pleads an estoppel claim, that fact alone requires suspension of the statute of frauds. As demonstrated below, that conclusion is clearly erroneous and will cause material injustice to Howell and any other party relying on the statute of frauds, as the decision conflicts with other decisions of this Court and the Court of Appeals.

## A. Prior Decisions of This Court Do Not Require Suspension of the Statute of Frauds Whenever an Estoppel Claim is Pled.

### 1. Relevant Case Law.

In Michigan, the suggestion that the mere existence of an estoppel claim can suspend application of the statute of frauds appears to be based on the principle set forth in a legal treatise. In *White v Prod Credit Assoc*, 76 Mich App 191, 194-95; 256 NW2d 436, 438 (1977), the Court of Appeals recognized that 3 Williston, Contracts (3d ed), § 533A, p 796 provides:

> Where one has acted to his detriment solely in reliance on an oral agreement, an estoppel may be raised to defeat the defense of the Statute of Frauds.

*White*, 76 Mich App at 194 (emphasis added). This language demonstrates that an estoppel claim may be raised to defeat the statute of frauds and that suspension of the statute of frauds is not absolute. Consistent with the permissive application of estoppel, later decisions of both this Court and the Court of Appeals have applied this principle only where there is reasonable reliance on a promise which induced the party asserting the existence of a contract to act.

In *Opdyke, supra*, this Court determined that it was appropriate to suspend application of the statute of frauds where the plaintiff pled an estoppel claim, but it did so based on facts different from those in the instant case. In rendering its incorrect decision here, the Court of Appeals relied exclusively on *Opdyke* to support its decision. *Opdyke* involved an alleged oral agreement to construct a sports arena in Pontiac, which was breached by the defendants, as well as letters of intent between the parties. The defendants asserted that the letters exchanged between the parties were too incomplete to satisfy the statute of frauds since the letters did not specify a construction site for the arena, a time for its completion, or a date on which the plaintiffs were to take possession.

Although the Court of Appeals in the instant matter believed that it was compelled to suspend application of the statute of frauds because Plaintiffs pled a promissory estoppel claim,

that result is not compelled by *Opdyke*. In fact, that is not the holding in *Opdyke* at all. Rather, as to the *Opdyke* plaintiffs' estoppel claim, this Court held only that:

> [D]isputed questions of fact exist as to whether a noncontractual promise was made by the defendants and reasonably relied upon by the plaintiff. Since the statute of frauds only applies to certain 'contracts,' recovery based on a noncontractual promise falls outside the scope of the statute of frauds. The plaintiff's alternate theory of promissory estoppel is sufficiently pleaded and supported to survive the defendants' motion for accelerated judgment based on the statute of frauds.

*Id*. at 370 (emphasis added). The promise that this Court in *Opdyke* determined was outside the statute of frauds was based on two letters of intent between the parties in which they discussed the subject matter of the alleged promise, construction of a sports arena, and also agreed upon a potential location for the arena. Although the parties did not agree to every aspect of their proposed venture, this Court determined that the writing at issue, the letters of intent, was sufficient to satisfy the statute of frauds. *Id*. at 368-369. This Court then determined that the plaintiffs' alternate theory of recovery, promissory estoppel based on the same letters of intent, was sufficiently pled to take the alleged agreement outside the statute of frauds, as it was based on the plaintiffs' reasonable reliance on a noncontractual promise. *Id*. at 370. The critical aspect of the *Opdyke* Court's decision is that it determined that the plaintiffs' promissory estoppel claim was sufficiently pled based on the written letters of intent between the parties, which included reference to the terms of their agreement, a key element that is missing in the instant case.

Similarly, in *Kelly-Stehney*, *supra*, a panel of the Court of Appeals, relying on *Opdyke*, applied an equitable estoppel exception to the statute of frauds relative to an oral agreement regarding an employment based commission agreement. In *Kelley-Stehney*, the parties entered into a written manufacturer's representative agreement pursuant to which the plaintiff would work for the defendant as an independent contractor selling the defendant's automotive products. The agreement provided that modifications had to be in writing. The defendant's president

proposed an oral agreement subsequent to the written agreement regarding payment of commissions and the length of the agreement. *Id.* at 610. The defendant then terminated the written agreement and refused to continue paying commissions on the oral agreement, asserting that the statute of frauds applied to bar the oral agreement. *Id*. The Court of Appeals determined that equitable estoppel applied as an exception to application of the statute of frauds as a challenge to the oral agreement because the evidence showed that the plaintiff's conduct induced the defendant to believe that he accepted the terms of the oral agreement and its conduct was based on that acceptance. *Id*. at 615.

Prior to these decisions, however, consistent with the language in the Williston treatise, the Court of Appeals refused to apply an estoppel claim as an exception to the statute of frauds where the party asserting the claim was not justified in relying on an alleged promise. In *McMath v Ford Motor Co*, 77 Mich App 721; 259 NW2d 140, 142-43 (1977), the defendant asserted that it and the plaintiff were parties to a written employment agreement, although the plaintiff denied ever signing an agreement. The plaintiff asserted that in reliance upon oral representations of the defendant, he quit another job. The plaintiff asserted that the defendant verbally informed him that he did not have to worry about the income he would lose by resigning his other job because the defendant would take care of him and he would have no future economic worries. *Id*. at 723. The defendant raised the statute of frauds as a defense and the plaintiff asserted that it was inapplicable because he pled a noncontractual promissory estoppel claim. *Id*. The court refused to apply an exception to the statute of frauds because the promise upon which the plaintiff allegedly relied was not sufficient to support his promissory estoppel claim. *Id*. at 726.

The court noted that to be sufficient to support an estoppel, a promise must be definite and clear. *Id*. The court looked to *Association of Hebrew Teachers of Metro Detroit v Jewish Welfare Fed of Detroit*, 62 Mich App 54; 233 NW2d 184 (1975) in support of its position on the plaintiff's promissory estoppel claim, in which a promise to negotiate and possibly provide some financial support was held to be too indefinite to impose a legal obligation on the defendant. In *Hebrew Teachers*, the court stated:

> Due to the indefiniteness and uncertainty of defendant's actual obligation, it is unclear what defendant promised plaintiff. . .
>
> As there is no specificity in the alleged promise, any award by the Court would be entirely speculative. Consequently, invocation of the doctrine of promissory estoppel would be inappropriate. The pleadings, affidavits, arguments, and briefs, being assumed truthful, disclose no legally enforceable obligation of the defendant. Thus, the avoidance of hardship and effecting of justice would not be achieved through an application of the doctrine of equitable estoppel.

*McMath*, 77 Mich App at 726 (quoting *Hebrew Teachers*, 62 Mich App at 61-62) (emphasis added). Relying on this holding, the *McMath* court similarly determined that the allegations at issue, even when taken as true, lacked the required specificity as to what the defendant said or did that led the plaintiff to rely to his detriment. *Id*. at 726. The court further determined that because the plaintiff's allegations lacked specificity and did not support a promise definite enough to justify his reliance, the doctrine of estoppel could not be invoked. *Id*.

In contrast to the facts in the instant matter, in *Lovely v Dierkes*, 132 Mich App 485, 490-91; 347 NW2d 752 (1984), the Court of Appeals determined that the plaintiff's estoppel claim was sufficient to bar application of the statute of frauds. The plaintiff's complaint alleged that he was induced to rely on the defendants' representations about a job. The plaintiff asserted that he relinquished two other jobs and relocated of his family, received a promise of a definite salary for a definite time and a percentage ownership in defendant corporation, and the defendants'

representation that a contract regarding these terms would be reduced to writing. The court determined that these allegations were sufficient for the application of promissory estoppel. *Id*.

**2. Analysis.**

Even more vague and uncertain than the alleged promises in *McMath* and *Hebrew Teachers*, which were insufficient to demonstrate an estoppel claim, the only alleged promise at issue in this lawsuit consists of the words "broker protected" on Howell's Sign. This purported "promise" is completely unlike any promise in any decision in which this Court or the Court of Appeals applied estoppel to suspend application of the statute of frauds. The "broker protected" language has no legal meaning, is not definite, contains no detail regarding the promise it allegedly asserts, says nothing about a commission and is otherwise meaningless. It is not directed at Plaintiffs and was not communicated by Howell to Plaintiffs relative to SJP or any other buyer. It promised nothing and, therefore, could not have induced Plaintiffs to rely on it. Therefore, any decision applying an estoppel claim is distinguishable from the instant matter and is irrelevant. The Court of Appeals' mechanical suspension of the statute of frauds based on Plaintiffs' poorly pled and unsupported promissory estoppel claim is incorrect and is inconsistent with Michigan law.

"The elements of a promissory estoppel claim consist of (1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produced reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided." *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 41; 761 NW2d 151 (2008) (emphasis added).

In *State Bank of Standish v Curry*, 442 Mich 76, 85-86; 500 NW2d 104 (1993), this Court

adopted the following definition of the term "promise:"

> A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.
>
> Courts are variably strict and flexible in determining whether a manifestation of intent may furnish a basis for promissory estoppel. The strict view, distinguishing promises that are future oriented from statements of belief, holds that a statement that is indefinite, equivocal, or not specifically demonstrative of an intention respecting future conduct, cannot serve as the foundation for an actionable reliance. Feinman, *Promissory estoppel and judicial method*, 97 Harv L R 678, 690-692 (1984). This is usually determined by finding that the promisor's expression concerning his future conduct is insufficiently certain or defined. *McMath* [*supra* at 725]. 'Similarly, if the expression is made in the course of preliminary negotiations when material terms of the agreement are lacking, the degree of certainty necessary in a promise is absent.' Feinman, *supra* at 691-692.
>
> Drawing heavily from the Restatement's definition of promise, it has been suggested that '[a] promise may be stated in words, either orally or in writing, or may be inferred wholly or partly from conduct. . . . Both language and conduct are to be understood in the light of the circumstances, including course of performance, course of dealing, or usage of trade.' Farber & Matheson, *supra* at 932 and n 104. In addition, '[a] promise must [also] be distinguished from a statement of opinion or a mere prediction of future events.' *Id.* at 933. . . .

*Curry*, 442 Mich at 85-86.

In a promissory estoppel claim, the promise must be definite and clear, and the reliance on it must be reasonable. *Zaremba*, 280 Mich App at 41. Michigan law confirms that to be sufficient to support an estoppel, a promise must be definite and clear. *Hebrew Teachers*, *supra*. In *Hebrew Teachers*, *supra*, the Court of Appeals determined that due to the indefiniteness and uncertainty of the defendant's actual obligation, it was unclear what the defendant promised the plaintiff. *Id*. at 61-62. Similarly, in *McMath*, *supra*, the plaintiff alleged that, based on the inducement of individuals at Ford, he resigned from his position as a Major General with the Air National Guard so that he could fulfill his allegiance to Ford. The court determined that the terms of the alleged promises made by Ford lacked the required specificity to support the definite and clear promise required to justify reliance under the doctrine of promissory estoppel. *Id*. at

725-26.

In the instant case, Plaintiffs have failed to identify any promise, let alone a promise so clear and definite that it would justify the reliance necessary to support a promissory estoppel claim under Michigan law. Plaintiffs claim in paragraph 41 of their complaint that "Howell Schools' Latson Sale Sign explicitly promised Plaintiffs that it would honor the earned broker fee for delivering them a buyer." (Ex. B, Complaint at ¶41). Based on this Court's adoption of the definition of the term "promise" as set forth above, the words "broker protected" did not constitute a promise, let alone a definite and clear promise sufficient to induce action or reliance of a substantial character. *McMath, supra*. Certainly, after Howell specifically rejected Plaintiffs' attempt to enter into a contract with them, Plaintiffs were in no position to rely upon any alleged promise resulting from Howell's Sign.

Based on Plaintiffs' own allegations, the language on the sign was not a promise, was not definite and clear and could not produce any reliance or forbearance by Plaintiffs, as required under Michigan law to support a claim of promissory estoppel. That makes this case critically distinguishable from any Michigan decision in which this Court or the Court of Appeals suspended the statute of frauds based on an estoppel claim. The Court of Appeals in the instant matter refused to acknowledge this and instead blindly held that *Opdyke* precluded application of the statute of frauds because of Plaintiffs' poorly pled estoppel claim. This decision was incorrect, as it was inconsistent with the Michigan law set forth above.

In support of their position as to the meaning of the "broker protected" language, Plaintiffs rely exclusively on one case, *National Newark & Essex Bank v Housing Auth of Newark*, 75 NJ 497 (1967). Plaintiffs look to this case for the proposition that the words "broker protected" mean that Plaintiffs are entitled to a commission in this matter. Plaintiffs' reliance on

this case is entirely misplaced. First, *National Newark* is a vastly distinguishable case and there is no case law in Michigan defining the term "broker protected." Therefore, there is no legal basis to support Plaintiffs' assertion that the "broker protected" language constituted a promise that Howell would pay Plaintiffs a commission on any sale of property, let alone one that Plaintiffs had no involvement in.

Regardless, even if *National Newark* carried any weight in Michigan courts, it too is vastly distinguishable from the instant case. In *National Newark*, the parties negotiated toward a real estate transaction that was actually closed. The only dispute in that case was whether the parties wrongfully withheld a commission based on the negotiated and agreed upon sale of property. That is not the case here. First and most important, in *National Newark*, all the parties knew of the identities of the other parties. That factor is lacking here, where Plaintiffs never disclosed to Howell that they had any relationship, formal or otherwise, with SJP. Indeed, Plaintiffs prohibited Howell from knowing of SJP's identity in order to prevent Howell and SJP from moving forward on a sale without Plaintiffs' involvement. Despite Plaintiffs' allegations to the contrary, no relationship between these entities was ever formed, and any reliance Plaintiffs placed on their hope or desire for a relationship is unsupported, even by their own allegations.

Second, an actual transaction, with all the parties involved, took place in *National Newark*. No transaction took place in the instant case which involved Plaintiffs, Howell and SJP. Rather, Plaintiffs conceded that they attempted to create a relationship with SJP and/or Howell, which both SJP and Howell rejected. Moreover, in the instant case, Plaintiffs do not assert that the language on Howell's Sign was ever relevant at any time. Based on Plaintiffs' complaint, the Sign was never discussed, never came up in any discussion with any individual and was never a consideration for any Defendant at any time. Therefore, the facts in *National Newark* are

completely distinguishable from those set forth in Plaintiffs' own complaint and the case provides absolutely no legal basis for Plaintiffs' alleged reliance on the language to support their promissory estoppel claim.

As set forth above, the promissory estoppel exception to a statute of frauds claim, even if viable, is not blindly and mechanically applied. Rather, it is applied only where the plaintiffs have actually pled an actionable estoppel claim. That is not the case here, where Plaintiffs pled an estoppel claim based only on the vague and meaningless words "broker protected." While Howell does not agree that it is ever appropriate to apply an exception to the statute of frauds, for purposes of this argument, Howell asserts that the Court of Appeals misunderstood when it may do so, misapplied Michigan law and has created additional tension and confusion as to when a plaintiff has pled facts sufficient to assert an estoppel claim. Based on this misconstruction of Michigan law, Howell requests that this Court grant leave to correct this clearly erroneous decision which will cause material injustice to Howell and all others seeking application of the statute of frauds.

## CONCLUSION

As demonstrated above, the Court of Appeals' decision:

(1) Perpetuates the judicial attack on the established rules of statutory construction in Michigan, thus calling into question the validity of the statute of frauds, a legislative enactment;

(2) Significantly impacts the public interest by eviscerating the application of the statute of frauds, a legislative enactment, particularly with respect to the statute's application to Howell, an agency of the state of Michigan;

(3) Involves a legal principle of major significance to the state's jurisprudence, as the

decision continues to attack the efficacy and validity of the statute of frauds, a legislative enactment; and

(4) Is clearly erroneous and will cause material injustice to Howell and any other party seeking to rely on the statute of frauds, as the decision conflicts with other decisions of this Court and the Court of Appeals.

For these reasons, and the reasons stated throughout this Application, Howell respectfully requests that this Court grant leave for Howell to appeal the Court of Appeals' decision pursuant to MCR7.305(B)(1), (2), (3) and (5), overrule case law which perpetuates the judicial attack on the established rules of statutory construction and which allows an estoppel claim to override application of the statute of frauds, reverse the Court of Appeals' clearly erroneous determination and reinstate the trial court's grant of summary disposition to Howell.

Alternatively, should this Court chose not to exercise its discretion in granting leave, Howell respectfully states that due to the clear error contained in the Court of Appeals' decision, and since the Court of Appeals' result in this case significantly alters legal principles of major significance to the state's jurisprudence, this Court, in lieu of granting leave to appeal, should issue a final decision or peremptory order reversing the Court of Appeals' decision for the reasons stated herein pursuant to MCR 7.302(H)(1).

Respectfully submitted,
**MCGRAW MORRIS P.C.**

By:Thomas J. McGraw
Thomas J. McGraw (P48817)
Stacy J. Belisle (P59246)
Attorneys for Defendant/Appellant Howell
2075 West Big Beaver Road, Suite 750
Troy, Michigan 48084
(248) 502-4000

Dated: March 22, 2017

**North American Brokers, LLC and Mark Ratliff**
**v**
**Howell Public Schools and St. John Providence**

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***EXHIBIT LIST***

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1. Michigan Court of Appeals Opinion dated February 9, 2017

2. Plaintiffs' Complaint